

DAN BURTON, INDIANA,
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
CONSTANCE A. MORELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. MC HUGH, NEW YORK
STEPHEN HORN, CALIFORNIA
JOHN L. MICA, FLORIDA
THOMAS M. DAVIS III, VIRGINIA
DAVID M. MCINTOSH, INDIANA
MARK E. SOUDER, INDIANA
JOE SCARBOROUGH, FLORIDA
STEVEN C. LATOURETTE, OHIO
MARSHALL "MARK" SANFORD, SOUTH CAROLINA
BOB BARR, GEORGIA
DAN MILLER, FLORIDA
ASA HUTCHINSON, ARKANSAS
LEE TERRY, NEBRASKA
JUDY BIGGERT, ILLINOIS
GREG WALDEN, OREGON
DOUG OSE, CALIFORNIA
PAUL RYAN, WISCONSIN
HELEN CHENOWETH, IDAHO
DAVID VITTER, LOUISIANA

ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051
TTY (202) 225-6852

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
ROBERT E. WISE, JR., WEST VIRGINIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
PATSY T. MINK, HAWAII
CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
CHAKA FATTAH, PENNSYLVANIA
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
ROD R. BLAGOJEVICH, ILLINOIS
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE
HAROLD E. FORD, JR., TENNESSEE
JANICE D. SCHAKOWSKY, ILLINOIS

BERNARD SANDERS, VERMONT,
INDEPENDENT

February 16, 2000

BY FACSIMILE

The Honorable Henry Solano

Solicitor

Department of Labor

200 Constitution Avenue, N.W. - Room S2002

Washington, D.C. 20210

Dear Mr. Solano:

This letter follows up on yesterday's hearing on the Department's use of non-codified documents and your agency's explanation within each of them to ensure the public's understanding of their legal effect. Please provide answers to the attached questions for the hearing record not later than noon on Thursday, March 9, 2000. In addition, please prepare a revised compendium including all 3,374 documents not later than noon on Thursday, March 16, 2000. Under the column entitled "Title of Non-Codified Document," please ensure that each title is understandable to the public.

Your response should be delivered to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058.

Thank you for your attention to this request.

Sincerely,



David M. McIntosh

Chairman

Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich

Q1. Gore's Reinventing Government. Since 1993, Vice President Gore has led a "Reinventing Government" initiative, including implementation of President Clinton's 1993 Executive Order 12862, entitled "Setting Customer Service Standards."

a. Has the Vice President's Reinventing Government initiative changed the way DOL has approached issuing guidance?

b. The Occupational Safety and Health Administration (OSHA) issued 15 boxes worth of guidance during the 3-year 1996-98 period and 16 boxes worth of guidance in 1999 alone. To what extent is this explosive growth driven by the "customer service" orientation of the Reinventing Government initiative?

c. What do you estimate was the annual volume of guidance during the preceding 12-year Reagan-Bush period?

Q2. Absence of Indication of No Legal Effect. We asked the Department of Labor (DOL) to tab and highlight all statements within OSHA's guidance documents that inform the public of the legal effect of the documents. Our investigation revealed that only 8% of the 1,176 guidance documents issued by OSHA during 1999 had any indication of their legal effect (although many of them were unclear), and 92% had no indication whatsoever. Also, only 5% had any indication of their legal effect at the beginning of the document, which is the logical and most useful place for such a statement. For example, DOL's first guidance document (with 1,267 pages) has a footnote indication about legal effect on page 582. Additionally, the Department admitted that none of the 3,374 OSHA guidance documents issued since the 1996 enactment of the Congressional Review Act (CRA) were submitted to Congress for review and none have any legal effect whatsoever.

a. Since the 1996 enactment of the CRA, did the Solicitor's office clear each guidance document prior to its issuance by the Department? If not, why not? What percent of the Department's guidance documents was reviewed by at least one attorney in the Solicitor's office prior to issuance?

b. Since our investigation of OSHA's 1999 guidance documents revealed that only 8% have any indication of legal effect, what is your estimate of the percent of guidance documents issued throughout the whole Department since 1996 without any indication of legal effect?

c. Is any bureau within the Department doing an especially good job or poor job presenting this essential information to the public? Which are doing a poor job?

d. What controls does the Solicitor's Office have in effect to remedy this problem?

(1) For all guidance documents issued after the October 1999 start of our investigation?

(2) For all guidance documents issued after the 1996 CRA and before the October 1999 start of our investigation?

(3) When will each of these guidance documents be appropriately revised to ensure the public understands they do not have any legal effect?

(4) If they will not be revised, how do you plan to clarify their legal standing to the public?

e. What is your estimate of the costs to the Department of producing the 3,374 guidance documents?

f. How many employees were involved in producing the 3,374 guidance documents? How many FTEs were involved in this production?

g. What is your estimate of the costs to the regulated public of DOL's 3,374 guidance documents?

Q3. OMB's CRA Guidance.

a. Do you see a need for the Office of Management and Budget (OMB) to expand its CRA guidance to ensure that the agencies submit all guidance documents with any general applicability or legal effect to Congress for review, as required by law?

b. Do you see a need for OMB to expand its CRA guidance to ensure that the public understands that agency guidance documents not submitted to Congress under the CRA are not legally binding?

c. Do all DOL bureaus understand that, under the CRA, interpretive rules, policy statements, policy clarifications, guidance, guidelines, policy directives, enforcement policies, opinion letters, question-and-answer documents, and other such documents with any general applicability or future effect need to be submitted to Congress for review?

d. If clear within DOL, do you believe that the other agencies are entirely clear about what documents need to be submitted to Congress under the CRA?

Q4. Possible Statutory Fix. On January 24, 2000, I introduced H.R. 3521 which includes a proposed statutory fix to ensure the public's understanding of the legal effect of agencies' noncodified guidance documents. The proposal is to state a Miranda-type disclaimer on the first page of each guidance document. On January 31st, I wrote the General Counsels of the Department of Transportation and EPA and you, asking for the Administration's official views by February 11th.

- a. What is your view of this proposal (in Section 4, entitled “Disclosure of Nonbinding Effect of Guidance Documents”)?
 - b. Do you have any other ideas for a statutory fix to ensure the public’s understanding?
- Q5. OSHA’s Work-At-Home Guidance. On January 5, 2000, I wrote you a letter about OSHA’s November 15, 1999 guidance document regarding work-at-home employees, which was withdrawn by Secretary Herman later on January 5th. Why has the Department not withdrawn its October 7, 1993, June 19, 1995, and February 21, 1997 work-at-home guidance documents on this subject?
- Q6. OSHA’s Arborists Guidance.
- a. Please explain why DOL issued and then why DOL withdrew its March 4, 1998 and December 13, 1999 guidance documents relating to arborists. The 1998 interpretation letter remained on DOL’s website for years after it was withdrawn; in fact, it was only removed earlier this month, possibly in anticipation of the February 15, 2000 hearing.
 - b. Was the threat of lawsuits by the National Arborist Association the principal reason for the June 22, 1998 and January 31, 2000 withdrawals?
 - c. Isn’t leaving withdrawn interpretation letters on your website just another backdoor method of regulating industry?
 - d. Did you ever post the two withdrawal letters on your website? If not, why not?
- Q7. Withdrawn Guidance.
- a. Besides OSHA’s 1999 work-at-home guidance and OSHA’s 1998 and 1999 arborists guidance, what other DOL guidance documents have been withdrawn since March 1996 and under what circumstances?
 - b. Did DOL ever post these other withdrawal letters? If not, why not? Please provide complete details for each case for the record.
- Q8. Application of PSM Standard to Oil and Gas Production Facilities. On November 4, 1999, OSHA rescinded three earlier letters of interpretation (8/26/92, 5/5/93 & 11/4/93) which excluded oil and gas production facilities from the Process Safety Management (PSM) standard (29 CFR 1910.119). After industry questioned OSHA’s policy change, pointing out its inconsistency with OSHA’s May 29, 1998 policy interpretation, OSHA withdrew its November 4, 1999 memorandum. On December 20th, OSHA issued a new memorandum (curiously dated November 20th) which removed the objectionable policy change. Please explain DOL’s policymaking process, which resulted in three rescissions, one inconsistency, and one withdrawal on the same subject all within a one-month period.

Q9. Family and Medical Leave Act Guidance. On April 7, 1995, the Employment Standards Administration (ESA) issued an interpretive letter, stating that the common cold, the flu, etc., are minor illnesses and are not covered by the Family and Medical Leave Act (FMLA). Then, on December 12, 1996, ESA changed its mind and issued a letter stating that the common cold and the flu are "serious health conditions" if they last more than three consecutive calendar days and involve continuing treatment (such as an antibiotic or a follow-up doctor's appointment).

a. Would you say that the 1996 letter contradicts the language and intent of the FMLA -- especially in light of the House Report which stated, "The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief"?

b. Isn't that exactly the kind of change in interpretation (i.e., an interpretation that changes an individual's or organization's rights or obligations) that should be submitted to Congress under the CRA and undergo Administrative Procedure Act (APA) notice-and-comment rulemaking procedures?

Q10. Stock Options Guidance. Stock options are increasingly an important part of compensation, especially for new high technology companies. On February 12, 1999, ESA issued a Fair Labor Standards Act (FLSA) nonregulatory guidance opinion letter applying the overtime requirements of the Act to a stock option program proposed by an employer for his employees.

a. Since the exact value of stock options is often difficult to determine, wouldn't the easiest way for employers to comply be to stop offering stock options for employees subject to the overtime requirements?

b. Shouldn't a regulatory policy change such as this be subject to public notice and comment?

Q11. Ergonomics Guidance and Enforcement.

a. Since OSHA has not yet issued a rule on ergonomics, why did OSHA issue nearly 25 ergonomics guidance documents in 1999?

b. Are you satisfied that it is clear to the regulated public that those documents have no legal effect?

c. Has the Solicitor's Office reviewed the 37 guidance documents on OSHA's Ergonomics website to ensure that the public is clear about the absence of any legal effect for them? If not, why not?

d. Despite the fact that DOL has no ergonomics rule, how many enforcement actions against employers has DOL taken for ergonomics problems?

e. Have any penalties and fines been issued against these employers? If so, what is the total assessment to date?

f. The National Legal Center for the Public Interest stated that, "[u]p to 1994 [OSHA] issued more than 430 citations for alleged ergonomics hazards." What is the relationship between DOL's not-legally-effective guidance documents and its enforcement actions? Do employers feel an unlegislated compulsion to comply with the guidance documents?

Q12. Augmentation of DOL FTEs by Use of Contractors. On December 3, 1999, we questioned DOL about its using a contractor to compile its OSHA nonregulatory guidance documents instead of doing the job with its own employees. On February 7, 2000, DOL finally provided a copy of its contract for this work. DOL added tasks to an existing contract instead of competing the work. The nearly \$1 million existing contract with Eastern Research Group, renewable for 4 additional 1-year periods, asks the contractor to perform services for OSHA on a "task order" basis. Tasks include analyzing data, assessing economic impact, estimating benefits, conducting evaluations, and doing other regulatory work.

a. How many contractors does DOL use to augment its 17,000 FTEs?

b. What is the total number of dollars awarded to contractors for work which could be done by DOL employees?

c. What role did the Eastern Research Group or any other contractor have in developing DOL's proposed ergonomics rule?

Q13. Guidance for Ann Landers-Type Questions. On September 23, 1999, OSHA issued guidance relating to a possible injury as a result of being struck by a bucket when it is being lowered to the ground. On June 16, 1999, OSHA issued guidance relating to a scene depicted in a newspaper photograph. On December 31, 1998, OSHA issued guidance relating to use of western hard hats "because hot items could fall into the brim." On December 11, 1996, OSHA issued guidance on whether an employer could be cited by OSHA when an employee trained in first aid panics in an emergency situation. Do you feel that the Department's reply to these Ann Landers-type "what if" letters is an appropriate expenditure of taxpayer dollars?

Q14. Types of OSHA Guidance Documents. To assist us in better understanding DOL's submission, please complete the following table. Please include each category of guidance issued during the 1993-1999 study period and included in the 38,756 pages of guidance submitted to us.

| Category of Guidance | # of the Documents 3/96-10/99 | # of Pages |
|--------------------------------|----------------------------------|---------------|
| Compliance directives | | |
| Compliance guides | | |
| Interpretation letters & memos | | |
| Manuals | | |
| News releases | | |
| Question-and-answers | | |
| Training manuals | | |
| ... | | |
| ... | | |
| ... | | |
| TOTAL | 3,374 | 38,756 |